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## MEMORANDUM

**TO:** Committee on Legal Services

**FROM:** Christy Chase, Office of Legislative Legal Services

**DATE:** December 5, 2017

**SUBJECT:** Rules of Division of Vocational Rehabilitation, Department of Labor and Employment, concerning the transfer of rules from the Colorado Department of Human Services to the Colorado Department of Labor and Employment, 7 CCR 1105-1 (LLS Docket No. 170161; SOS Tracking No. 2016-00652).<sup>1</sup>

### Summary of Problems Identified and Recommendations

Section 8-85-103 (4), C.R.S., requires the Department of Labor and Employment to promulgate a rule for the block distribution of state money to independent living centers and specifies that the rule must include a base amount of at least \$600,000 plus other factors to adjust the base amount. Rule 9.207.3 of the Division of Vocational Rehabilitation, regarding State Allocation for Delivery of Independent Living Services, sets forth a formula for calculating the distribution of state money to independent

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<sup>1</sup> Under § 24-4-103, C.R.S., the Office of Legislative Legal Services reviews rules to determine whether they are within the promulgating agency's rule-making authority. Under § 24-4-103 (8)(c)(I), C.R.S., the rules discussed in this memorandum will expire on May 15, 2018, unless the General Assembly acts by bill to postpone such expiration.

living centers but fails to specify the base amount to which the formula applies. **Because the Department failed to promulgate rules setting the base amount for the block distribution of state money to independent living centers as required by section 8-85-103 (4), C.R.S., we recommend that Rule 9.207.3 of the rules of the Division of Vocational Rehabilitation not be extended.**

Section 24-4-103 (12.5)(a), C.R.S., authorizes agencies to adopt rules that incorporate by reference a code or rule adopted by an agency of the United States if the rules meet requirements listed in the statute, including reference to the code or rule by citation and date. However, the Division of Vocational Rehabilitation's Rules 9.209, 9.209.1, and 9.209.2 A. incorporate specified federal laws and regulations in the Code of Federal Regulations by reference but do not reference the date of the regulations. **Because these rules conflict with the requirement in section 24-4-103 (12.5)(a), C.R.S., that federal laws and regulations incorporated by reference include a date, we recommend that Rules 9.209, 9.209.1, and 9.209.2 A. of the rules of the Division of Vocational Rehabilitation not be extended.**

## **Analysis**

### **1. Rule 9.207.3 fails to establish, as required by section 8-85-103 (4), C.R.S., the base amount for block distribution of state money to independent living centers.**

Section 8-85-103, C.R.S., establishes the Office of Independent Living Services within the Department of Labor and Employment to oversee contracts with and the distribution of state money to independent living centers. Subsection (4) of that section requires the department to adopt rules specifically pertaining to the distribution of state money to independent living centers and provides:

- 8-85-103. Functions of office - functions of department - appropriations - rules.** (4) On or before July 1, 2016, the department shall promulgate a rule for the block distribution of state money to independent living centers. The rule must include at least:
- (a) A base amount of not less than six hundred thousand dollars; and
  - (b) Other factors agreed to by the independent living centers, which may include a per capita adjustment, a per county adjustment, or other adjustments.

Rule 9.207.3 of the rules of the Division of Vocational Rehabilitation<sup>2</sup> addresses the allocation of state money to independent living centers for delivering independent living services. The rule provides:

**9.207.3 STATE ALLOCATION FOR DELIVERY OF INDEPENDENT LIVING SERVICES**

Certified Centers for Independent Living will be allocated General Funds in addition to their base amount of General Funds with a weighted formula that divides County disability population, plus County population, and Land Area by population to determine for each County. The resulting figure is the amount which each CIL will receive.

Specific calculations of the formula are:

- A. 1st assign each Colorado County a score of:  $40\% \times (\text{County 16-64 Disability Population} / \text{State 1664 Disability Population})$
- B. 2nd add the weighted score of:  $20\% \times (\text{County 65+ Population} / \text{State 65+ Population})$
- C. 3rd add the weighted score of:  $40\% \times (\text{County Quantile Average of Land Area} / \text{Population})$
- D. 4th multiply this score of each County by the available funds;
- E. 5th divide it by 100.
- F. 6th sum up all the County scores from within each CIL's catchment area.

CILS whose catchment areas share a County shall report to the Department, how they will allocate County scores between them. If these CILS do not reach an agreement, the Department shall determine and document the allocation of County scores between the CILS.

While Rule 9.207.3 sets forth the formula for calculating the allocation of state money to an independent living center, the rule fails to specify, as required by section 8-85-103 (4)(a), C.R.S., the "base amount of not less than six hundred thousand dollars" to which the factors are to be applied for determining the specific allocation to each independent living center. Because the rule fails to include the base amount, as required by the statute, Rule 9.207.3 of the rules of the Division of Vocational Rehabilitation should not be extended.

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<sup>2</sup> It appears that the Office of Independent Living Services is an office under the Division of Vocational Rehabilitation.

**2. Rules 9.209, 9.209.1, and 9.209.2 A. incorporate federal regulations by reference but fail to include the date of the regulations as required by section 24-4-103 (12.5)(a)(II), C.R.S.**

Section 24-4-103 (12.5), C.R.S., of the State Administrative Procedure Act authorizes agencies to adopt rules that incorporate by reference codes or rules adopted by an agency of the United States if the rules meet specified requirements, including a reference to the code or rule by citation and date. Section 24-4-103 (12.5), C.R.S., provides, in pertinent part:

**24-4-103. Rule-making - procedure - definitions - statutory citation correction - repeal.** (12.5) (a) A rule may incorporate by reference all or any part of a code, standard, guideline, or rule that has been adopted by an agency of the United States, this state, or another state, or adopted or published by a nationally recognized organization or association, if:

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(II) **The reference fully identifies the incorporated code, standard, guideline, or rule by citation and date,** identifies the address of the agency where the code, standard, guideline, or rule is available for public inspection, and states that the rule does not include any later amendments or editions of the code, standard, guideline, or rule; (**Emphasis added**).

The department is granted rulemaking authority under section 8-85-105, C.R.S., which provides:

**8-85-105. Rules.** The department shall promulgate rules setting forth standards for levels and types of core services. The rules and standards must comply with federal rules as defined in Title VII, section 725 of the federal "Rehabilitation Act of 1973", as amended. The department shall also adopt rules that set standards for certification of independent living centers and shall require that any center must be designated as an eligible agency under Title VII, section 725 of the federal "Rehabilitation Act of 1973", as amended, and must meet all federal requirements for independent living centers.

Nothing in the department's rulemaking authority allows the department to adopt rules that incorporate federal laws and regulations in a manner that is inconsistent with the requirements of section 24-4-103 (12.5), C.R.S.

Rules 9.209, 9.209.1, and 9.209.2 A. of the Division of Vocational Rehabilitation incorporate by reference various federal laws and regulations, but the rules do not include the date of the applicable versions of the federal laws and regulations. The rules provide as follows:

## **9.209 EVALUATION OF CENTERS: ENFORCEMENT PROCEEDINGS**

**[Rev. eff. 7/1/12]**

With regards to enforcement proceedings, DVR/OIL shall comply with all federal rules and regulations, incorporated herein by reference, including 34 CFR 366.40, 366.41, 366.42, and 366.43. Any appeal will follow CFR 366.44, 366.45, and 366.46. This rule does not contain any later editions of those parts. Copies of these regulations are available from: Colorado Department of Labor and Employment, Division of Vocational Rehabilitation, Office of Independent Living, 633 17th Street, 15th Floor, Denver, CO 80202 or at any State Publications Depository Library.

### **9.209.1 Modification of Enforcement Proceedings [Rev. eff. 7/1/12]<sup>3</sup>**

If the funds received by the CIL under the SILS program include federal funds administered by the Colorado Department of Human Services in accordance with, and incorporated herein by reference, Section 723 Title VII of the Federal Act, as defined in Section 9.202, the enforcement procedures required by 34 1<sup>4</sup>C.F.R. 366.40 through 366.46 under the authority of 29 U.S.C. Section 711(c) and 796F-2 (g) and (i), as defined in Section 9.202, will be included in enforcement proceedings with respect to the Section 723 federal funds only, as defined in Section 9.202 (Federal Act). This rule does not contain any later editions of those parts. Copies of these regulations are available from: Colorado Department of Labor and Employment, Division of Vocational Rehabilitation, Office of Independent Living, 633 17th Street, 15th Floor, Denver, CO 80202 or at any State Publication Depository Library.

### **9.209.2 TERMINATION OF FUNDS [Rev. eff. 4/1/13]**

A CIL's funds may be terminated for:

A. Failure to meet the requirements of 34 CFR 366.40 through 366.46. This rule does not contain any later editions of those parts. Copies of these regulations are available from: Colorado Department of Labor and Employment, Division of Vocational Rehabilitation, Office of Independent Living, 633 17th Street, 15th Floor, Denver, CO 80202 or at any State Publication Depository Library.

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<sup>3</sup> This rule still refers to the Department of Human Services, but, presumably, this reference should be to the Department of Labor and Employment.

<sup>4</sup> The adopted rule 9.209.1 contains a typographical error in that the numeral "1" appears before the reference to C.F.R. The adopted rule is included in this memorandum verbatim, including the typographical error.

B. Failure to meet contract requirements within the statement of work and its exhibits including, but not limited to, general and special provisions.

C. A decision to terminate funding will also terminate the organization's certification as a center. Refer to Section 9.203.3 for clarification on re-certification.

Because these rules do not include a date for the specific federal laws and regulations that are incorporated by reference, as required by section 24-4-103 (12.5)(a), C.R.S., Rules 9.209, 9.209.1, and 9.209.2 A. should not be extended.

## **Recommendations**

We therefore recommend that the following rules of the Division of Vocational Rehabilitation not be extended:

- Rule 9.207.3, concerning state allocation for delivery of independent living services, because the Department failed to promulgate rules setting the base amount for the block distribution of state money to independent living centers as required by section 8-85-103 (4), C.R.S.; and
- Rules 9.209, 9.209.1, and 9.209.2 A., because the rules conflict with the requirement in section 24-4-103 (12.5)(a), C.R.S., that federal laws and regulations incorporated by reference include a date.